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IN THE

Supreme Court of the United States

October Term, [redacted] 1970

No. ..... [redacted]

231

COUNTY OF ORANGE, a political subdivision of the State of California and CITY OF BUENA PARK,

Petitioners,

vs.

STERLING LIQUOR DISTRIBUTORS, INC.,

Respondent.

Petition for a Writ of Certiorari to the Court of Appeal, State of California, Fourth Appellate District, Division One.

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COUNTY OF ORANGE, a political subdivision of the State of California and CITY OF BUENA PARK,

Petitioners,

vs.

STERLING LIQUOR DISTRIBUTORS, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI.

The County of Orange, State of California, and the City of Buena Park, County of Orange, State of California, as defendants in the Superior Court of the State of California, for the County of Orange, in a consolidated action by respondent herein to recover ad valorem property taxes paid under protest which were levied by said public entities, and as appellants in a consolidated appeal in the Court of Appeal in the State of California, Fourth Appellate District, Division One, petition for a Writ of Certiorari to review said latter Court's decision to affirm the judgments of said Superior Court granting a refund of said ad valorem property taxes.

I.
Opinions Below.

The judgments of the said Superior Court are appended herein as Appendix A. The opinion of the said Court of Appeal is appended herein as Appendix B and is reported in 3 Cal. App. 3d 510 [83 Cal. Rptr. 571]. There was no opinion by the Supreme Court of the State of California which declined to review the decision of the Court of Appeal. A copy of the California Supreme Court's order, dated March 11, 1970, denying petitioners' request for hearing in said Court is appended herein as Appendix C.

II.
Jurisdiction.

The jurisdiction of this court is invoked under 28 U.S.C. Section 1257(3) since a privilege and immunity are specifically set up and claimed under the Constitution of the United States to invalidate the actions taken by public officials under the taxing laws of the State of California.

III.
Questions Presented.

1. Whether or not Article I, Section 10, Clause 2 of the United States Constitution precludes the levy of ad valorem property tax on goods imported for resale while such goods are held by the importer in their original packages.

2. Whether or not goods imported for resale should be treated in the same manner as goods imported for use (manufacture) for purposes of the California ad valorem property tax.

IV.
Constitutional Provision Involved.

United States Constitution, Article I, Section 10, Clause 2.

> "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its Inspection Laws . . ."

V.
Statement of the Case.

As of California tax lien date in 1966 and 1967, Sterling Liquor Distributors, Inc., (hereinafter referred to as Sterling) was an importer of liquor, operating a wholesale warehouse in the City of Buena Park, County of Orange, State of California. The imported liquors were kept in their original cartons upon receipt by Sterling and were kept physically separate from the domestic liquors in the warehouse by being stacked in their unopened cases according to brand. The imported liquors were sold by Sterling in their oriiginal unopened cases except where individual orders were received for less than case lots. When orders for less than case lots were received, such orders were filled from a separate section of the warehouse known as the "repack area." Only in that area were any broken cases to be found.

Some of the liquor (distilled spirits) in the warehouse on the 1966 lien date would be resold within 60 to 90 days of the lien date. The remaining liquor (wines, champagne and vermouth) in the warehouse on the 1966 lien date would be resold within four to eight months of the lien date [R., Reporter's Transcript (hereinafter referred to as R.T.), p. 13]. The time required to replenish the supply of distilled spirits on

hand on the 1966 lien date was 60 to 90 days and the time required to replenish the supply of wines, champagnes and vermouth in the warehouse on the 1966 lien date was four to eight months [R., R.T., p. 13]. Similar order times were required to replenish the supply of liquor on hand in the warehouse on the 1967 lien date [R., R.T., p. 14]. In addition, some of the imported liquor in the warehouse on the 1966 and 1967 lien dates had been on hand since as early as 1963 or 1964 [R., R.T., pp. 14-17].

Petitioners herein assessed ad valorem property taxes on the unopened cases of liquor held by Sterling in its Buena Park warehouse for the years 1966-67 and 1967-68. Sterling paid the respective taxes for those two years under protest and then timely filed the aforementioned suits for refund. The basis of the protests and suits was that the taxes were imposed on goods imported for resale, while the goods remained in the hands of the importer in the original unopened packages in which they were imported, in violation of Article I, Section 10, Clause 2 of the United States Constitution. [R., Clerk's Transcript in Civil No. 9556 (hereinafter referred to as C.T., No. 9556), pp. 1-6 and Clerk's Transcript in Civil No. 9557 (hereinafter referred to as C.T., No. 9557), pp. 1-8]. Petitioners controverted this position in the California Superior Court, Court of Appeal, and in their Petition for Hearing before the California Supreme Court [R., C.T., No. 9556, pp. 7-8; C.T., No. 9557, pp. 9-10; Appendix B herein]. Petitioners, therefore, raised the federal questions they seek to have reviewed herein at all levels of the proceedings in the aforementioned State Courts.

Pursuant to Stipulation, said matters were consolidated for purposes of trial and were tried in the said Superior Court on September 11, 1968. The Superior Court concluded that Article I, Section 10, of the United States Constitution precludes the levy of ad valorem property tax on goods imported for sale while such goods, prior to their sale by the importer, are held by the importer in their original unopened packages [R., C.T., No. 9556, p. 42; C.T., No. 9557, p. 44]. The court also found that the subject imported liquors were "imports" within the meaning of Article I, Section 10, of the United States Constitution on the respective lien dates and that the imposition of a tax on the liquors by petitioners violated said constitutional provision thereby entitling Sterling to a refund of said taxes [R., C.T., No. 9556, pp. 42-43; C.T., No. 9557, p. 45]. On October 4, 1968, petitioners filed a Notice of Appeal and to prepare clerk's and reporter's transcripts in the said Superior Court [R., C.T., No. 9556, p. 47; C.T., No. 9557, p. 49]. Thereafter, on January 13, 1970, said consolidated matters were argued in the said Court of Appeal. The decision of said Court of Appeal was filed January 15, 1970. Said decision, appended hereto as Appendix B, affirmed the judgments of the aforementioned Superior Court on the basis that the taxes were levied on goods protected from such taxation by Article I, Section 10, Clause 2 of the United States Constitution.

Following the filing of the decision of the Court of Appeal, petitioners timely filed a petition for review of said Court of Appeal decision with the California Supreme Court. The Supreme Court declined to review on March 11, 1970.

VI.

Reasons for Granting Writ.

1. The Rule Applicable to Goods Imported for Use (Manufacture) Should Also Be Applied to Goods Imported for Resale.

The decision of the Court of Appeal is based upon the "original package doctrine" as first enunciated by the United States Supreme Court in *Brown v. Maryland*, 25 U. S. (12 Wheat.) 419. Although recognizing the existence of a different rule concerning the taxation of goods imported for use in manufacturing, the Court of Appeal concluded that goods imported for sale are not taxable until they have passed from the control of the importer or been broken up by him from their original cases, citing *Brown v. Maryland, supra*; *Low v. Austin*, 80 U. S. (13 Wall.) 29 [20 L. Ed. 517]; *Department of Rev. v. James Beam Distill. Co.*, 377 U. S. 341 [84 S. Ct. 1247]; *Youngstown Sheet and Tube Co. v. Bowers*, 358 U. S. 534 [79 S. Ct. 383], and *Virtue Bros. v. County of Los Angeles*, 239 Cal. App. 2d 220 [48 Cal. Rptr. 505], as authority.

Petitioners contend that the rule applicable to goods imported for use in manufacturing, to wit: that such goods which are committed to the purpose of manufacture on the lien date are subject to non-discriminatory ad valorem property taxation, should also be applied to goods imported for sale.

The present state of the case law treating goods importe for sale in a different way from goods imported for use in manufacturing does not find support in either the spirit or language of the United States Constitution. In the words of United States Supreme Court Justice Frankfurter in his dissenting opinion in

the case of *Youngstown Sheet and Tube Co. v. Bowers,* 358 U. S. 534 [3 L. Ed. 2d 490, 79 S. Ct. 383], at page 563:

> "Indeed there is no process of logic, however dextrous, which would strike down a tax on imported goods being held prior to sale and allow a tax on goods stored prior to the processing which is preliminary to sale."

In order to bring justice and uniformity to the law, petitioners submit that as a minimum the "current operational needs" test of *Youngstown Sheet and Tube Co. v. Bowers,* 358 U. S. 534 [79 S. Ct. 383, 3 L. Ed. 490] and *Virtue Bros. v. County of Los Angeles,* 239 Cal. App. 2d 220 [48 Cal. Rptr. 505] should prevail over the "original package doctrine." The United States Constitution makes no distinction between goods imported for use in manufacturing and goods imported for sale. The United States Constitution speaks only in terms of all "imports."

The cases of *Youngstown* and *Virtue Bros.* involved the importation of goods for use in manufacturing. In *Youngstown,* 358 U. S. 534, at pages 549-550, the Court states as follows:

> "The materials here in question were imported to supply, and were essential to supply, the manufacturer's current operating needs. When, after all phases of their importation had ended, they were put to that use and indiscriminate portions of the whole were actually being used to supply daily operating needs, they stood in the same relation to the State as like piles of domestic materials at the same place that were kept for use and used in the same way. The one was then as fully subject to

taxation as the other. In those circumstances, the tax was not on 'imports,' nor was it a tax on the materials because they had been imported, but because at the time of the assessment they were being used, in every practical sense, for the purposes for which they had been imported. They were therefore subject to taxation just like domestic property that was kept at the same place in the same way for the same use. We cannot impute to the Framers of the Constitution a purpose to make such a discrimination in favor of materials imported from other countries as would result if we approved the views pressed upon us by the manufacturers. Compare *May v. New Orleans* (178 U. S. at 509)."

In *Virtue Bros.*, the California Court of Appeal, Second Appellate District, Division Two, State of California, states the rule in 239 Cal. App. 2d 220 [48 Cal. Rptr. 505], at page 231, as follows:

"The materials here in question had reached the end of their importation journey, and indiscriminate portions of the whole were actually being used to supply daily operating needs. The property tax upon them was non-discriminatory; they were not singled out because they were imported, nor was the tax even remotely connected with the activity of importation. Had the materials been of domestic origin, they would have been fully taxable under the assessment now in dispute. By enforcing this tax, California is in no way taking undue advantage of its position as an importing state to the detriment of inland states."

Hence, the Court in each case found that portions of the manufacturer's imported inventory supply were actually being used to supply daily operating needs. In each case, the Court held that the imported goods were

subject to non-discriminatory ad valorem property taxation. In the present case, the imported goods were being used to meet current inventory needs of the taxpayer [R., R.T., pp. 13-17]. The entire amount of inventory on hand was a 60 to 90 day supply for distilled spirits and a four to eight month supply for wines, champagnes and vermouth. The taxpayer ordered distilled spirits 60 to 90 days in advance and wines, champagnes and vermouth two or three times a year [R., R.T., p. 13]. Some of the merchandise had been on hand in the warehouse for two years prior to the dates on which the taxes were levied [R., R.T., pp. 16-17]. The goods were stored in the same warehouse as domestic goods [R., C.T., No. 9556, p. 35; C.T., No. 9557, p. 37] and received the benefits of the fire, police and government protection which are funded by the California ad valorem property tax.

Although the Court of Appeal's decision concludes that the *Youngstown* and *Virtue Bros.* cases affirmed the "original package doctrine" of *Brown v. Maryland,* petitioners submit that *Youngstown* did not so hold and *Virtue Bros.* is incorrect to the extent that it concludes *Youngstown* did. In espousing its rule concerning taxation of goods imported for use in manufacturing, the majority held in the *Youngstown* case as follows:

> "Whatever may be the significance of retaining in the 'original package' goods that have been so imported for sale . . . goods that have been so imported for use in manufacturing are not exempt from taxation, though not removed from the 'original package,' if, as found here, they have been 'put to the use for which they [were] imported.' "[1]

[1] 358 U. S. 534, 548.

To conclude that this holding excludes goods imported for sale is to conclude that every court decision affirms all prior decisions of said court which it does not expressly overrule even though the reasoning of its decision clearly demonstrates that the decision is completely contrary to the reasoning of other cases. As pointed out by Justice Frankfurter in his dissent in the case of *Youngstown Sheet and Tube Co. v. Bowers*, 358 U. S. 534 [3 L. Ed. 2d 490, 79 S. Ct. 383], at page 570, petitioners respectfully submit that "A close examination of the Youngstown case makes apparent [the] effective reversal of all previous judicial decisions on the Import Clause."

The effect of the holding in *Youngstown* is described in *Virtue Bros.* as follows:

> "In our opinion, *Youngstown* requires that the full inventory in the possession of plaintiffs, committed to the purpose of manufacture, on the first Monday of March, is subject to taxation."[2]

Hence, such imported goods which have been put to the use for which they were imported are subject to non-discriminatory ad valorem property taxation on lien date according to *Youngstown* and *Virtue Bros.*

Petitioners contend that it is discrimination against domestic goods and goods imported for use in manufacturing to hold that goods imported for resale are not subject to a non-discriminatory ad valorem property tax merely because they are kept in their original package by an importer when such goods are actually being used by the importer to supply his current inventory needs. Certainly goods imported for sale are

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[2]239 Cal. App. 2d 220 [48 Cal. Rptr. 505], 231.

"put to the use for which they were imported" when they are sitting in the importer's warehouse awaiting sale. Petitioners submit that the subject goods were thus taxable even without reference to Sterling's 'current' inventory needs."

While it is true that the goods were imported for sale, it is also true that the goods were imported to maintain an inventory of goods for purposes of sale. If these goods had been imported for use in manufacturing and had been "put to the use for which they were imported," they would be taxable. *Youngstown* and *Virtue Bros., supra.* It is inconsistent, unsound and illogical to apply a different rule to the subject goods simply because they were imported for resale.

2. Article I, Section 10, Clause 2 of the United States Constitution Does Not Exempt Goods Imported for Resale From Non-Discriminatory Ad Valorem Property Taxation.

Petitioners further contend that none of the remaining authorities relied upon by the Court of Appeal in reaching its decision require the conclusion that Article I, Section 10, Clause 2 of the United States Constitution prohibits non-discriminatory ad valorem property taxation of goods imported for sale. Each of the remaining cases cited by the Court of Appeal as authority for its decision rely on the famous "original package doctrine" first espoused by the United States Supreme Court in 1827 in the case of *Brown v. Maryland,* 25 U. S. (12 Wheat.) 419 [6 L. Ed. 678]. It is submitted that a careful analysis of *Brown v. Maryland,* in light of its facts and the historical context in which it was decided, discloses that said decision and the line of

cases following that decision do not control the issues presented to the Court of Appeal in this case and that the "original package doctrine" is ancient, antiquated, and as artificial as the "separate but equal" doctrine of *Plessy v. Ferguson,* (1896) 163 U. S. 537 [16 S. Ct. 1138, 41 L. Ed. 256], discarded by the Supreme Court in *Brown v. Board of Education,* (1954) 347 U. S. 483 [74 S. Ct. 686, 98 L. Ed. 873].

In *Brown v. Maryland,* the tax which the Supreme Court struck down as being an "impost" or "duty" was a license fee of $50 which the State of Maryland require all importers of foreign goods to pay. The defendant Brown was convicted for selling foreign imports without a license and he appealed his conviction claiming that the Maryland licensing statute was unconstitutional. The Court in an opinion written by Justice Marshall, held that the license fee was a duty on imports and was prohibited by the United States Constitution. The issue before the Court is described in the opinion written for the Court by Chief Justice Marshall as follows:

> "The cause depends entirely on the question whether the legislature of a state can constitutionally require the importer of foreign articles to take out a license from the state, before he shall be permitted to sell a bale or package so imported."[3]

The Court concluded that the license fee was a duty on imports and was prohibited by the United States Constitution. This limited holding is all that *Brown v. Maryland* should, properly analyzed, stand for.

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[3] 25 U. S. (12 Wheat.) 419, 434.

Unfortunately, Chief Justice Marshall in speaking for the Court went on in his opinion and set down the "original package doctrine" which the trial court and Court of Appeal in this case felt compelled to follow. When it is remembered that the Constitution which the Court was called upon to construe in 1827 had been adopted less than 40 years before, that the Confederation states, of which Maryland was one, were undoubtedly still interested in preserving their power to tax and uncertain as to how much of that power they had surrendered, and that the case was the first to be presented to the Court involving the Import Clause of the Constitution, it is easy to understand why Chief Justice Marshall felt compelled to answer each and every argument urged upon the Court by the attorneys for the State of Maryland. The policies which led to the inclusion of the Import Clause in the Constitution were no doubt worthy of defense at the time the opinion was rendered. These policies are described by Justice Frankfurter in his dissenting opinion in the *Youngstown* case, 358 U. S. 534 [3 L. Ed. 2d 490; 79 S. Ct. 383] at page 570 as:

(1) The necessity of vesting exclusive power over foreign economic relations and foreign commerce in the new National Government.

(2) The need to secure to the National Government an important source of revenue.

(3) The desire to prevent the seaboard States, possessed of important ports of entry, from levying taxes on goods flowing through their ports to inland States.

As suggested in the *Virtue Bros.* case, "Foreseeing the conflict between the inherent right of a state to tax

and the constitutional inhibition to tax imports,"[4] and endeavoring to defend the policies behind the Import Clause in answering all of the points raised by argument of the Maryland attorneys, Chief Justice Marshall espoused the "original package doctrine" as follows:

> "The constitutional prohibition on the states to lay a duty on imports—a prohibition which a vast majority of them must feel an interest in preserving—may certainly come in conflict with their acknowledged power to tax persons and property within their territory. The power, and the restriction on it, though quite distinguishable when they do not approach each other, may yet like the intervening colors between white and black, approach so nearly, as to perplex the understanding, as colors perplex the vision in marking the distinction between them. Yet the distinction exists, and must be marked as the cases arise. Till they do arise, it might be *premature* to state any rule as being universal in its application. It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the state; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the constitution."[5] (Emphasis added).

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[4]239 Cal. App. 2d 220 [48 Cal. Rptr. 505] 222.

[5]25 U. S. (12 Wheat.) 419, 439.

Even Chief Justice Marshall admitted the possible problem he would be creating by prematurely setting forth a doctrine applicable to situations not within the facts of the case before the court.

Reliance by the California Court of Appeal on the dictum of *Brown v. Maryland*, and the United States Supreme Court cases of *Low v. Austin* and *Department of Rev. v. James Beam Distill. Co.* which were also decided on the basis of this dictum from *Brown v. Maryland* is in itself reason for this Court to grant a Writ of Certiorari so that a decision can be rendered which is unbridled by the outdated and unsound doctrine set forth therein. While the decisions in the cases of *Brown v. Maryland* and *Department of Rev. v. James Beam Distill. Co.* are unquestionably correct, inasmuch as the taxes involved therein were taxes levied directly on imports as such, the mechanical application of the "original package doctrine" is unnecessary to their holdings. The mechanical application of such doctrine in the case of *Low v. Austin* and the present case, however, demonstrates the need for review and to discard said doctrine.

Petitioners disagree with the statement of Mr. Justice Field found in *Low v. Austin*[6] that the decision of *Brown v. Maryland* furnishes the answer to the question before the Court in that case as well as in the case at bar, and contend that the constitutional test should be based upon an analysis of the type of tax involved, *i.e.*, whether it discriminates against imports or whether it impedes the policies described by Justice Frankfurter in *Youngstown* which gave rise to the in-

[6]80 U. S. (13 Wall.) 29.

clusion of the Import Clause in the Constitution. A non-discriminatory ad valorem property tax, imposed alike upon all property in the state, cannot, in any sense be considered a tax which discriminates against imports or impedes such policies. Petitioners have consistently contended, and do now contend, that the rationale espoused by the California Supreme Court in 1870 in the case of *C. Adolph Low & Co. v. Austin*,[7] a case involving the very issue presented by this case, should be accepted and followed.

> "It is admitted that the state may tax imported goods after they have become incorporated with the mass of the wealth of the state. It is contended that the property taxed in this case had not become incorporated with the mass of the general wealth of the state, simply because it was still the property of the importer in the original package in which it was imported.
>
> We see nothing in this which even tends to show that the property had not become incorporated with the general wealth of the state. We see no reason why imported goods, exposed in the store of a merchant for sale, do not constitute a portion of the wealth of the state as much as do domestic goods similarly situated. Nor do we see the slightest difference whether the importer is also the merchant who sells, or whether the goods are in the original packages or not. In either case the goods are exposed for sale in the markets for the profit which may be realized from selling. They may be equally the basis of credit, and alike they require and receive the benefit of the police laws of the

[7] 1 Cal. Unrep. 638.

state, and upon every principle of equality should contribute to pay for their protection. Possibly the plaintiff, who is a commission merchant, has in his store champagne wines manufactured in Sonoma or Los Angeles, which he is offering to sell in the same market in precisely similar packages. In what possible sense can one be said to constitute a portion of the wealth of the state in which the other does not? The object of the constitutional restriction is said to be to prevent the state from imposing a tax upon commerce—to discriminate against foreign goods. It certainly cannot be intended to discriminate against domestic productions, by exempting foreign goods from its share of the cost of protecting it.

A tax, which is imposed alike upon all the property of the state, cannot, in any sense, be considered a tax upon commerce. It has no tendency to discourage importations. Exemption from the tax might encourage importations, but certainly it was not the purpose of the restriction to compel the state to offer a bounty to foreign producers over domestic. The tax prohibited must be a tax upon the character of the goods as importations rather than upon the goods themselves as property.

But it is not true that the right of the state to tax imports depends upon the question whether they are still in the original packages, in the hands of the importer or wholesale dealer, or not; nor even whether they have become thoroughly incorporated into the general mass of property or not. It is said that a power which can impose a small tax may impose a large one, and, therefore, if there

were no restriction, the state could, through its power of taxation, prevent importations altogether. If the test as to whether the goods are imports or not, within the meaning of the restriction, be whether they are still in the hands of the importer or a wholesale dealer, in the original packages, or not, then as soon as they have been sold or the packages broken it would follow that the state might impose any tax it might see fit. But a large tax upon the consumer of foreign goods would as effectually prevent importation as a tax upon the commodity in the hands of the importer. Many articles might not be taxed until after they had been in the hands of the consumer for years, as, for instance, railroad iron, and then be subject to so high a tax as effectually to prevent all importations. There can be no doubt that such a tax would be declared void, otherwise the restriction can serve no purpose whatsoever. Any tax upon imported goods as a class, or which discriminates against them, is within inhibition. On the other hand, all the wealth of the state, whether it be in imported goods, in the hands of the importer, or in the original packages in which they were imported, or not, are subject to the general ad valorem tax, which is imposed alike upon all values within the state."[8] (Emphasis added).

While it is true that the case of *Department of Rev. v. James Beam Distill. Co.* was decided after the *Youngstown* case, petitioners disagree with the effect ascribed to said case by the Court of Appeal in this case. That effect, of necessity, requires the conclusion

[8] 1 Cal. Unrep. 638, 642-644.

that the Supreme Court has affirmed a dual standard for non-discriminatory ad valorem property taxation cases arising under the Import Clause. As heretofore argued in this Petition, "there is no process of logic, however dextrous, which would strike down a tax on imported goods being held prior to sale and allow a tax on goods stored prior to the processing which is preliminary to sale." A careful analysis of the *James Beam* case discloses that the tax which the Supreme Court struck down was once again a license tax which discriminated against imports as such. As pointed out by the Court:

> "The Kentucky Court of Appeals held that the tax in question, although an occupational or license tax in form, is a tax on imports in fact. '[T]he incidence of the tax is the act of transporting or shipping the distilled spirits under consideration into this state.' "[9]

Hence, the tax which was struck down was the type of tax held to be prohibited by the Import Clause in *Brown v. Maryland*, a tax which petitioners concede is prohibited by the United States Constitution. All that was necessary to the Court's decision concerning the prohibition of the tax under consideration in discussing the Import Clause was as follows:

> "The tax here in question is clearly of a kind prohibited by the Export-Import Clause. Brown v. Maryland, 12 Wheat. 419, 6 L. Ed. 678."[10]

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[9] 377 U. S. 341, 343.
[10] 377 U. S. 341, 343.

Petitioners submit that the remaining discussion of the Import Clause in the *James Beam* case is simply once again a restatement of the unfortunate dictum of *Brown v. Maryland,* cited without analysis in *Low v. Austin* and in *Department of Rev. v. James Beam Distill. Co.* No language in the *James Beam* case indicates that the Supreme Court squarely faced the issue presented by the instant case or considered the effect of its Youngstown decision on the facts similar to those presented herein.

As the court said in *Virtue Bros.* about the question before it, the question presented by the case at bar ". . . has like a sleeping dog, been allowed to lie although there have been some abortive kicks in the past."[11] Although the resolution of the long dormant question may have a deep bite, as the resolution of the question in *Youngstown* has had, the resolution should be made logically.

Conclusion.

The present state of the law treating goods imported for use in manufacturing in a different way from goods imported for sale does not find support in either the spirit or language of the United States Constitution. As concluded by Justice Frankfurter, petitioners submit that *Youngstown* effectively reversed all previous judicial decisions on the Import Clause. Said decision at least effectively discarded the "original package doc-

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[11]239 Cal: App. 2d 220, 222.

trine" as a mechanical device for deciding taxation questions under the Import-Export Clause of the United States Constitution. Merchandise imported for resale should be subject to non-discriminatory ad valorem taxation regardless of whether or not goods are kept in their original package. The constitutional test should be based upon an analysis of the type of tax involved, *i.e.*, whether it discriminates against imports or whether it impedes the policies described by Justice Frankfurter in *Youngstown* which gave rise to the inclusion of the Import Clause in the Constitution.

The effect of the California Court of Appeal decision herein requires the conclusion that there exists a dual standard for taxing imported goods. The Court's interpretation and application of Article I, Section 10, Clause 2 of the United States Constitution to prohibit non-discriminatory ad valorem taxation of goods imported for sale in reliance on the outdated and archaic "original package doctrine" dictum of *Brown v. Maryland*, and the line of cases following thereafter, in light of the principles enunciated in the *Youngstown* and *Virtue Bros.* decisions requires the review by this Honorable Court of an important and substantial question of law.

For the foregoing reasons, Petitioners respectfully urge this Court to exercise its sound judicial prerogatives and end the present unwarranted interpretation of the Import-Export Clause of the Constitution by granting the Petition for Certiorari to the Court of

Appeal—State of California—Fourth Appellate District, Division One.

Dated: Los Angeles, California, on June 5, 1970.

Respectfully submitted,

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Assistant County Counsel,

and

LAURENCE M. WATSON,
Deputy County Counsel,

By ROBERT F. NUTTMAN,
Attorneys for Petitioners.

APPENDIX A.

Findings of Fact and Conclusions of Law and Judgments of the Orange County Superior Court, State of California.

Superior Court of the State of California, for the County of Orange.

Sterling Liquor Distributors, Inc., a corporation, Plaintiff, vs. County of Orange, et al., Defendants. No. 155940.

The above-entitled matter came on regularly for trial on the 11th day of September, 1968, in Department 7 of the above-entitled court, the Honorable Robert P. Kneeland, Judge, presiding. The Plaintiff appeared by its attorneys, Latham & Watkins by Donald P. Newell and H. Hal Visick, and Defendants appeared by their attorneys Adrian Kuyper, County Counsel, by Timothy L. Strader. A Stipulation of Facts was filed by the parties and oral and documentary evidence was introduced. The Court having considered the stipulated facts and all of the evidence, oral and documentary, having examined the memoranda of legal authority submitted by counsel and having heard the oral arguments of counsel, makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. Plaintiff Sterling Liquor Distributors, Inc. is a corporation duly organized and existing under and by virtue of the laws of the State of California, with principal offices at 5900 Rodeo Road, Los Angeles, California.

2. Defendant, County of Orange, is a body politic duly organized and existing under the laws of the State of California.

3. Defendant, City of Buena Park, is a municipal organization duly organized and existing under and by virtue of the laws of the State of California.

4. Defendant, City of Buena Park, has duly authorized Defendant, County of Orange, to act as assessing and collecting agent for the assessing and collection of Property Taxes for the Defendant City of Buena Park, and at all times material to this action the Defendant County of Orange through its qualified officers has duly assisted in such capacity for and on behalf of Defendant City of Buena Park.

5. Plaintiff was at all times material to this action engaged in the wholesale distribution of, among other things, imported and domestic distilled spirits and wines (hereinafter collectively referred to as "liquors"). Plaintiff was and is the original importer of all imported liquors which are the subject of this action.

6. Plaintiff did not at any time material to this action engage in retail trade.

7. At all times material to this action, Plaintiff maintained a warehouse at 6350 Altura Boulevard, City of Buena Park, County of Orange, California, in which Plaintiff kept domestic and imported liquors. Within said warehouse, the imported liquors were kept physically separate from the domestic liquors and were stacked in their original cases according to brand. The stack or stacks of each brand of liquor were kept physically separate from all of the other stacks. Said imported liquors were resold in their original unopened cases, except where individual orders were received for less than case lots. When orders for less than case lots were received, such orders were filled from a separate sec-

tion of said warehouse known as the "repack area." Only in this area were any broken cases to be found.

8. At twelve o'clock noon on Monday, March 6, 1967, Plaintiff had on hand at said warehouse liquors in unbroken cases imported from foreign sources of a full cash value of $48,027.66.

9. On or about April 1, 1967, Plaintiff filed with Andrew J. Hinshaw, Orange County Assessor, a Claim for Immunity From Ad Valorem Tax On Merchandise Imported For Resale, claiming exemption of said $48,027.66 of imported liquors from ad valorem taxation. Thereafter, said Assessor placed an assessed value of $12,007.00 on said imported merchandise, which is 25% of the full cash value, and a tax of $1,142.50 was levied thereon. Plaintiff timely paid under protest the full amount of said $1,142.50 to Defendants, and filed this action for recovery of said taxes within six months after the date of payment.

10. All of said imported liquors in issue were purchased and imported by Plaintiff from foreign sources and upon their arrival were placed directly in said warehouse and held by Plaintiff in their original unbroken cases. All of said imported liquors were held by Plaintiff for resale "as is" to Southern California retailers.

CONCLUSIONS OF LAW

1. Article I, Section 10 of the United States Constitution precludes the levy of an ad valorem tax on goods imported for sale while such goods, prior to their sale by the importer, are held by the importer in their original unbroken packages.

2. The imported liquors here in issue were "imports" within the meaning of Article I, Section 10, and retained their character as imports on March 6, 1967.

3. The imposition of a tax on the liquors by Defendant violated Artirle I, Section 10 of the Constitution, and such tax must be refunded to Plaintiff.

Let judgment be entered for Plaintiff accordingly.

DATED: October 4, 1968.

Robert P. Kneeland
Judge of the Superior Court

Judgment.

Superior Court of the State of California, for the County of Orange.

Sterling Liquor Distributors, Inc., a corporation, Plaintiff, vs. County of Orange, et al., Defendants. No. 155940.

This cause came on regularly for trial on September 11, 1968, in Department 7 of the above-named Court, the Honorable Robert P. Kneeland, Judge, presiding, sitting without a jury, a jury having been duly waived. Latham & Watkins by Donald P. Newell and H. Hal Visick appeared as counsel for Plaintiff, and Adrian Kuyper, County Counsel by Timothy L. Strader appeared as counsel for Defendants. The Court having considered all of the evidence, oral and documentary, having examined the memoranda of legal authority submitted by counsel, having heard oral arguments of counsel and being fully advised in the premises herein, and the Court having made and caused to be filed its written Findings of Fact and Conclusions of Law, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that

Plaintiff have and recover from Defendants the sum of $1,142.50, together with interest thereon from August 31, 1967, at a rate per centum per annum equal to the rate per centum per annum that Defendants have received through investment or by bank deposit on said $1,142.50, and together with Plaintiff's costs of suit in the amount of $39.25.

DATED: October 4, 1968.

/S/ Robert P. Kneeland
Judge

Proposed Findings of Fact and Conclusions of Law.

Superior Court of the State of California, for the County of Orange.

Sterling Liquor Distributors, Inc., a corporation, Plaintiff, vs. County of Orange, et al., Defendants. No. 151849.

The above-entitled matter came on regularly for trial on the 11th day of September, 1968, in Department 7 of the above-entitled court, the Honorable Robert P. Kneeland, Judge, presiding. The Plaintiff appeared by its attorneys, Latham & Watkins by Donald P. Newell and H. Hal Visick, and Defendants appeared by their attorneys, Adrian Kuyper, County Counsel, by Timothy L. Strader. A Stipulation of Facts was filed by the parties and oral and documentary evidence was introduced. The Court having considered the stipulated facts and all of the evidence, oral and documentary, having examined the memoranda of legal authority submitted by counsel and having heard the oral arguments of counsel, makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. Plaintiff Sterling Liquor Distributors, Inc. is a corporation duly organized and existing under and by virtue of the laws of the State of California, with principal offices at 5900 Rodeo Road, Los Angeles, California.

2. Defendant, County of Orange, is a body politic duly organized and existing under the laws of the State of California.

3. Defendant, City of Buena Park, is a municipal organization duly organized and existing under and by virtue of the laws of the State of California.

4. Defendant, City of Buena Park, has duly authorized Defendant, County of Orange, to act as assessing and collecting agent for the assessing and collection of Property Taxes for the Defendant City of Buena Park, and at all times material to this action, the Defendant County of Orange through its qualified officers has duly assisted in such capacity for and on behalf of defendant City of Buena Park.

5. Plaintiff was at all times material to this action engaged in the wholesale distribution of, among other things, imported and domestic distilled spirits and wines (hereinafter collectively referred to as "liquors"). Plaintiff was and is the original importer of all imported liquors which are the subject of this action.

6. Plaintiff did not at any time material to this action engage in retail trade.

7. At all times material to this action, Plaintiff maintained a warehouse at 6350 Altura Boulevard, City of Buena Park, County of Orange, California, in which Plaintiff kept domestic and imported liquors. Within

said warehouse, the imported liquors were kept physically separate from the domestic liquors and were stacked in their original cases according to brand. The stack or stacks of each brand of liquor were kept physically separate from all of the other stacks. Said imported liquors were resold in their original unopened cases, except where individual orders were received for less than case lots. When orders for less than case lots were received, such orders were filled from a separate section of said warehouse known as the "repack area." Only in this area were any broken cases to be found.

8. At twelve o'clock on Monday, March 7, 1966, Plaintiff had on hand at said warehouse liquors in unbroken cases imported from foreign sources of a full cash value of $401,263.91.

9. On or about April 1, 1966, Plaintiff filed with Andrew J. Hinshaw, Orange County Assessor, a Claim for Immunity From Ad Valorem Tax On Merchandise Imported For Resale, claiming exemption of said $301,263.91 of imported liquors from ad valorem taxation. Thereafter, said Assessor placed an assessed value of $100,316.00 on said imported merchandise, which is 25% of the full cash value, and a tax of $9,998.09 was levied thereon. Plaintiff timely paid under protest the full amount of said $9,998.09 to Defendants, and filed this action for recovery of said taxes within six months after the date of payment.

10. All of said imported liquors in issue were purchased and imported by Plaintiff from foreign sources and upon their arrival were placed directly in said warehouse and held by Plaintiff in their original unbroken cases. All of said imported liquors were held by Plaintiff for resale "as is" to Southern California retailers.

CONCLUSIONS OF LAW

1. Article I, Section 10 of the United States Constitution precludes the levy of an ad valorem property tax on goods imported for sale while such goods, prior to their sale by the importer, are held by the importer in their original unbroken packages.

2. The imported liquors here in issue were "imports" within the meaning of Article I, Section 10, and retained their character as imports on March 7, 1966.

3. The imposition of a tax on the liquors by Defendant violated Article I, Section 10 of the Constitution, and such tax must be refunded to Plaintiff.

Let judgment be entered for Plaintiff accordingly.

DATED: October 4, 1968.

/s/ Robert P. Kneeland
Judge of the Superior Court

Judgment.

Superior Court of the State of California, for the County of Orange.

Sterling Liquor Distributors, Inc., a corporation, Plaintiff, vs. County of Orange, et al., Defendants. No. 151849.

This cause came on regularly for trial on September 11, 1968, in Department 7 of the above-named Court, the Honorable Robert P. Kneeland, Judge, presiding, sitting without a jury, a jury having been duly waived. Latham & Watkins by Donald P. Newell and H. Hal Visick appeared as counsel for Plaintiff, and

Adrian Kuyper, County Counsel by Timothy L. Strader appeared as counsel for Defendants. The Court having considered all of the evidence, oral and documentary, having examined the memoranda of legal authority submitted by counsel, having heard oral arguments of counsel and being fully advised in the premises herein, and the Court having made and caused to be filed its written Findings of Fact and Conclusions of Law, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that

Plaintiff have and recover from Defendants the sum of $9,998.09, together with interest thereon from August 21, 1966, at a rate per centum per annum equal to the rate per centum per annum that Defendants have received through investment or by bank deposit on said $9,998.09, and together with Plaintiff's costs of suit in the amount of $39.25.

DATED: October 4, 1968.

/s/ ROBERT P. KNEELAND
Judge

APPENDIX B.

Opinion of the Court of Appeal.

In the Court of Appeal, Fourth Appellate District, State of California, Division One.

Sterling Liquor Distributors, Inc., a corporation, Plaintiff and Respondent, v. County of Orange, et al., Defendants and Appellants. 4 Civ. No. 9556 and No. 9557.

Filed, Jan. 15, 1970.

APPEAL from judgments of the Superior Court of Orange County. Robert P. Kneeland, Judge. Affirmed.

Adrian Kuyper, County Counsel and Timothy L. Strader, Deputy County Counsel, for Defendants and Appellants.

Latham & Watkins, and Donald P. Newell, for Plaintiff and Respondent.

Defendants County of Orange and City of Buena Park appeal from two judgments for plaintiff in actions for refund of *ad valorem* property taxes. The cases were consolidated for trial and on appeal.

The facts are stipulated by the parties.

1. Plaintiff is an importer of liquor.

2. The imported liquors were kept in their original cartons upon receipt by plaintiff. They were separated from the domestic liquors and stacked in their unopened cases according to brand. The imported liquors were resold in their orignial unopened cases, except where individual orders were received for less than case lots. When orders for less than case lots were re-

ceived, such orders were filled from a separate section of the warehouse known as the "repack area." Only in that area were any broken cases to be found.

3. Plaintiff did not use the liquor for any purpose; it was retained by plaintiff at its warehouse until sold to plaintiff's wholesale customers.

4. Defendants assessed *ad valorem* property taxes on the unopened cases of liquor held by plaintiff in the years 1966-67 and 1967-68. Plaintiff paid the taxes of $9,998.09 and $1,142.50 respectively for those two years under protest.

5. These suits for refund were timely filed.

6. Following trial the court entered judgment for plaintiff in both cases for the full amount of the tax.

ISSUES ON APPEAL

> ". . . whether or not Article I, Section 10, Clause 2 of the United States Constitution precludes the levy of . . . ad valorem property tax on goods imported for resale while such goods are held by the importer in their original packages.
>
> ". . . whether or not goods imported for resale should be treated in the same manner as goods imported for use (manufacture) for purposes of the California ad valorem property tax."

Defendants' basic contention on appeal is that this court should abrogate the "original package doctrine" as first enunciated by the United States Supreme Court in *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419. That doctrine, which has been continuously followed since the time of its inception by the high court, prohibits tax upon goods imported for sale while they retain

their character as imports. (*Low v. Austin,* 80 U. S. 29 (13 Wall.) [20 L. Ed. 517]; *Department of Rev. v. James B. Beam Distill. Co.,* 377 U. S. 341, [84 S. Ct. 1247]; *Parrott & Co. v. City and County of S. F.,* 131 Cal. App. 2d 332.)

Defendants concede in their brief that if *Brown v. Maryland, supra,* 25 U. S. (12 Wheat.) 419, applies to this case the Orange County property tax could not be constitutionally applied to the liquor here involved. Defendants rely upon the cases of *Youngstown Sheet and Tube Co. v. Bowers,* 358 U. S. 534 [79 S. Ct. 383]; *Virtue Bros. v. County of Los Angeles,* 239 Cal. App. 2d 220 and *C. Adolph Low & Co. v. Austin,* 1 Cal. Unrpt. 638 to support their contention. They maintain that since those cases have held that imports which are to be used for manufacture, and have completed the importation process, are taxable by the states, goods imported for sale should be subject to the same taxation. They further assert that *Youngstown* expressly overruled *Low v. Austin, supra,* 80 U. S. 29 (13 Wall.) [20 L. Ed. 517], a California case in which the United States Supreme Court held that imported liquor was not subject to an *ad valorem* property tax while it was still in its original package.

However, defendants' argument finds no support in the cases upon which they relied. *Youngstown* clearly states it is only concerned with goods imported for manufacture and, further, that such goods do not lose their character as imports any sooner or more readily than imports for sale. The fact situation in *Youngs-*

town was such that the goods were being used for the purpose for which they had been imported. It was upon that basis the Supreme Court sanctioned taxation.

Virtue Bros. v. County of Los Angeles, supra, 239 Cal. App. 2d 220, not only does not overrule the long chain of cases concerning goods imported for sale, but specifically excludes such imports from its decision. At page 223, the court says:

> "*Youngstown* does not permit the type of state tax here levied on materials imported for sale. *Youngstown* affirms that materials imported for sale are still immune."

Further, the Supreme Court has affirmed its stand after the *Youngstown* decision. In *Department of Rev. v. James B. Beam Distill. Co., supra,* (1964) 377 U. S. 341, 345 [84 S. Ct. 1247], the court again relied upon *Low v. Austin, supra,* 80 U.S. 29 (12 Wall.) [20 L. Ed. 517], and decided a case in which the fact situation was identical with the one at bar. It held:

> "The tax here in question is clearly of a kind prohibited by the Export-Import Clause. *Brown v. Maryland,* 12 Wheat, 419, 6 L. Ed. 678. As this Court stated almost a century ago in *Low v. Austin,* 13 Wall. 29, 20 L. Ed. 517, a case involving a California *ad valorem* tax on wine imported from France and stored in original cases in a San Francisco warehouse, 'the goods imported do not lose their character as imports, . . . until they have passed from the control of the importer or been broken up by him from their original cases.

Whilst retaining their character as imports, a tax upon them, in any shape, is within the constitutional prohibition.' (citations)" (*Department of Rev. v. James B. Beam Distill. Co.*, [84 S. Ct., 1247].)

Judgments affirmed.

Griffin, *J.**

We Concur:

Gerald Brown, *P. J.*

Coughlin, *J.*

---

*Retired Presiding Justice of the Court of Appeal under

APPENDIX C.

CLERK'S OFFICE SUPREME COURT

4250 State Building

San Francisco, California 94102

Mar 11 1970

Dear Sir: I have this day filed Order Hearing Denied.

In re 4 Civ., 9556. In re 4 Civ. No. 9557, Sterling Liquor Distributors vs. County of Orange.

WILLIAM I. SULLIVAN

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IN THE

Supreme Court of the United States

October Term, 1970

No. 231

COUNTY OF ORANGE, a political subdivision of the State of California and City of Buena Park,

Petitioners,

vs.

STERLING LIQUOR DISTRIBUTORS, INC.,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeal, State of California, Fourth Appellate District, Division One.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

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IN THE

Supreme Court of the United States

October Term, 1969
No. 1663

COUNTY OF ORANGE, a political subdivision of the State of California and City of Buena Park,
Petitioners,

vs.

STERLING LIQUOR DISTRIBUTORS, INC.,
Respondent.

On Petition for Writ of Certiorari to the Court of Appeal, State of California, Fourth Appellate District, Division One.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

I.
Jurisdiction.

The jurisdiction of this court is sustained under 28 U.S.C. Section 1257(3) since the actions taken by Petitioner were invalidated below on the grounds that they infringed upon a privilege and immunity granted Respondent by the Constitution of the United States.

II.
Opinions Below.

The superior court entered judgment for Respondent (see Appendix A to Petitioners' Brief), which was affirmed by the court of appeal (see Appendix B to Petitioners' Brief). There was no opinion by the Supreme Court of the State of California which declined to review the decision of the court of appeal. A copy

of the California Supreme Court's order, dated March 11, 1970, is appended to Petitioners' Brief as Appendix C.

III.

Constitutional Provision Involved.

United States Constitution, article I, section 10, Clause 2.

> "No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws . . ."

IV.

Question Presented.

Whether article I, section 10, clause 2 of the United States Constitution precludes the levy of ad valorem property tax on goods imported for resale while such goods are held by the importer in their original package.

V.

Statement of the Case.

The facts of this case are concisely stated in the opinion of the court of appeal (see Petitioners' Brief, Appendix B). Respondent is an importer of liquor. The imported liquors in question were kept in Respondent's warehouse in their original unopened packages and held for sale to retailers. Petitioners assessed ad valorem property taxes on the unopened cases for the years 1966-1967 and 1967-1968. Respondent paid such taxes and filed suit for refund. The trial court entered judgment for Respondent, which judgment was affirmed by the court of appeal. The Superior Court of the State of California declined to review the decision.

ARGUMENT.

There Is No Substantial Federal Question.

The court below has decided this case in accord with the applicable decisions of this Court. *Anglo-Chilean Nitrate Sales Corp. v. Alabama,* 288 U.S. 218 (1933), *Low v. Austin,* 80 U.S. (13 Wall.) 29 (1871), *Brown v. Maryland,* 25 U.S. (12 Wheat.) 419 (1827). *See Youngstown Sheet and Tube Company v. Bowers,* 358 U.S. 534 (1959) and *Department of Revenue v. James Beam Distilling Company,* 377 U.S. 341 (1969). The state court cases likewise have uniformly supported the position of the California court. *See, e.g., Tricon, Inc. v. King County,* 60 Wash. 2d 392, 374 P.2d 174 (1962), *cert. denied,* 374 U.S. 277 (1963); *H. A. Morton Company v. Board of Revenue, City of Milwaukee,* 15 Wis. 2d 330, 112 N.W.2d 914 (1962), *Miehle Printing Press v. Department of Revenue,* 18 Ill. 2d 445, 164 N.E.2d 1 (1960); *Emhart Corporation v. Town of West Hartford,* 28 Conn. Sup. 134, 253 A.2d 670 (Ct. C.P. 1968). The Court is simply being asked by Petitioner to review a question it has considered and consistently determined on several past occasions.

In *Brown v. Maryland,* this Court construed the Constitution's Import Clause for the first time. The Court held that goods imported for sale are exempt from State taxation while held by the importer in their "original package." The facts in this case are not in dispute. The goods in question in the instant case were at all times held for sale by Respondents in their original packages.

The specific question now before the Court was decided in *Low v. Austin, supra.* The facts in *Low v.*

Austin are identical to the facts in the instant case; the tax is the very tax sought to be imposed here by Petitioners. In *Low* the plaintiffs were importers of wine and commission merchants in San Francisco. They had received a shipment of imported wines which they held in their warehouse, in the original cases, awaiting sale. The City and County of San Francisco imposed an ad valorem property tax upon the wines. This Court, reversing the California Supreme Court, held the imported wines non-taxable. There, as here, the position of the taxing authority was based on the non-discriminatory nature of an ad valorem property tax. In response to this contention the Court held as follows:

> The obvious answer to this position is found in the fact, which is, in substance, expressed in the citations made from the opinions of Marshall and Taney, that the goods imported do not lose their character as imports, and become incorporated into the mass of property of the State, until they have passed from the control of the importer or have been broken up by him from their original cases. Whilst retaining their character as imports, a tax upon them in any shape, is within the constitutional prohibition. The question is not as to the extent of the tax, or its equality with respect to taxes on other property, but as to the power of the state to levy any tax." 80 U.S. (13 Wall.) 34-35.

It is not surprising that the California Supreme Court declined to review the instant case inasmuch as the lower court correctly followed the holding of this Court in *Low*.

In *Youngstown Sheet and Tube Company v. Bowers*, 358 U.S. 538 (1959), this Court held that goods imported by a manufacturer lose their distinctive character as imports when they are used to supply the day-to-day manufacturing requirements of the manufacturer-importer, although they have not been removed from their original packages, 358 U.S. 548-549.

The *Youngstown* case held only that such manufacturing goods have been "put to the use for which they [were] imported," and therefore are taxable regardless of the fact that they remain in their original packages. 358 U.S. 548. The Court explicitly recognized the important dichotomy between goods imported for sale and goods incorporated into a day-to-day manufacturing inventory. 358 U.S. 548-549. The former are obviously not "put to the use for which they were imported" until they are sold.

Petitioners rely on a phrase from Justice Frankfurter's dissent in *Youngstown Sheet and Tube Company v. Bowers* for the proposition that *Youngstown* is a "reversal of all previous judicial decision on the Import Clause" (358 U.S. at 750, Petitioners' Brief at 10). There are several reasons why Petitioners' position is untenable.

First, the majority in *Youngstown* expressly refrained from overruling any prior decision. They note at the outset that one may read *Brown v. Maryland* as stating that goods imported for use by the importer have no exemption. The majority followed *Hooven & Allison Co. v. Evatt*, 324 U.S. 652 (1945) (the only other Supreme Court decision dealing with goods imported for use in manufacturing) in deciding that materials imported for use by the importer are exempted

from taxation by the states until "put to use." However, the *Youngstown* majority decided that manufacturers have put their goods to use when such goods are placed in inventory to supply current manufacturing needs and thus are irrevocably committed to use in manufacture. *Youngstown*, far from overruling *Brown v. Maryland*, builds upon Justice Marshall's holding, amplifying and explaining its application to goods imported for use in manufacturing without disturbing its application to goods imported for sale.

Secondly, both *Brown v. Maryland* and *Low v. Austin* have been cited and followed numerous times since the *Youngstown* case. For example, in *Department of Revenue v. James Beam Distilling Co.*, 377 U.S. 341 (1964), the State of Kentucky had imposed a tax of 10 cents per gallon on liquor shipped into the state. The tax was collected while the whiskey remained in unbroken packages in the hands of the original importer and prior to resale or use by the importer. The Court held that the tax was barred by the Import Clause, citing *Brown v. Maryland* and quoting the following from *Low v. Austin:*

> "The goods imported do not lose their character as imports, . . . until they have passed from the control of the importer or have been broken up by him from their original cases. Whilst retaining their character as imports, a tax upon them, in any share, is within the constitutional prohibition." (377 U.S. at 384).

The Court's reliance on *Low* in the *James Beam* case does not support petitioner's contention that *Youngstown* overruled *Low*.

Moreover, in the years since *Youngstown*, this Court has also twice denied *certiorari* in cases involving

attempts by taxing authorities to levy ad valorem taxes against imported goods held in their original packages for resale. *City of Detroit v. Kenwall Products Corp.*, 14 Mich. App. 657, 165 N.W.2d 875, *cert. denied*, 90 S.Ct. 87 (1969). *Tricon, Inc. v. King County*, 60 Wash. 2d 392, 374 P.2d 174 (1962), *cert. denied*, 374 U.S. 227 (1963).

The decision in *Virtue Bros. v. County of Los Angeles*, 239 Cal. App. 2d 220, 48 Cal. Rptr. 505 (1966), cited profusely by Petitioners, provides no support for Petitioners' position. The California Court of Appeal succinctly stated:

> "*Youngstown* does not permit the type of state tax here levied on materials imported for sale. *Youngstown* affirms that materials held for sale are still immune." (239 Cal. App. 2d at 223).

Conclusion.

The authorities are uniform: Goods imported for sale and held in their original unopened packages remain "imports" and are not subject to state taxation of any kind, whether discriminatory or non-discriminatory. Petitioners in essence are requesting this Court to review the identical question settled by this Court in *Low v. Austin* and consistently followed on numerous occasions. For the reasons and on the basis of the authorities set forth in this brief, Respondent respectfully submits that Petitioners' Petition for Writ of Certiorari should be denied.

Dated: Los Angeles, California, on July 8, 1970.

Respectfully submitted,

RICHARD F. ALDEN,
DONALD PATRICK NEWELL,
LATHAM & WATKINS,
Attorneys for Respondent.